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3
4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 * * *

7 LOLA MCGEE,

8 Plaintiff,

9 v.

10 PATRICK R. DONAHOE, *et al.*

11 Defendants.
12

Case No. 2:13-cv-01426-RFB-VCF

ORDER

Defendant's Motion for Reconsideration
(ECF No. 129)

13 **I. INTRODUCTION**

14 This order addresses Defendant's Motion for Reconsideration of Magistrate Judge
15 Ferenbach's order regarding deposition fees (ECF No. 129).

16 For the reasons stated below, the Motion for Reconsideration is DENIED.
17

18 **II. BACKGROUND**

19 On September 11, 2015, the Court ordered limited discovery on the issue of equitable
20 tolling. (ECF No. 57). As part of this limited discovery Defendant noticed the deposition of Dr.
21 Jenkins, one of Plaintiff's former treating physicians. On March 4, 2016, Magistrate Judge
22 Ferenbach held a hearing and allowed the deposition to go forward as noticed, over McGee's
23 objection. (ECF No. 89). Dr. Jenkins cost \$1,000 an hour to depose. Based on the cost, Defendant
24 intended to limit their questioning to one hour. On March 8, 2016, McGee sought discovery
25 sanctions based on Defendant's refusal to allow her questioning of Dr. Jenkins unless she paid for
26 the time. (ECF No. 90). On March 30, 2016, Defendant's deposition of Dr. Jenkins took place,
27 while Plaintiff's motion for sanctions was pending, lasting one hour. Plaintiff was unable to ask
28 any questions of Dr. Jenkins.

1 On May 20, 2016, Magistrate Judge Ferenbach held a hearing regarding various motions,
2 including Plaintiff's motion for sanctions. (ECF No. 111). On May 20, 2016, Magistrate Judge
3 Ferenbach issued a minute order stating "IT IS ORDERED that the Defendant will subpoena Dr.
4 Jenkins for a deposition no later than 07/08/2016. Defendant will pay \$500.00 for thirty (30)
5 minutes of testimony wherein the Plaintiff will have twenty (20) minutes of questioning, and
6 Defendant will be allowed ten (10) minutes of follow-up." (ECF No. 111). However, Magistrate
7 Judge Ferenbach's written order stated that Plaintiff could not ask Dr. Jenkins questions at his
8 deposition unless she compensated him. (ECF No. 113).

9 On June 2, 2016, the Defendant filed a motion for clarification of Magistrate Judge
10 Ferenbach's orders. (ECF No. 115). On June 24, 2016, Magistrate Judge Ferenbach, at the hearing
11 regarding Defendant's motion for clarification, ordered that Defendant reconvene the deposition
12 and allow Plaintiff twenty minutes of questioning. Defendant was ordered to incur the expenses of
13 setting up this reconvened deposition. (ECF Nos. 120, 126). On July 8, 2016, Defendant objected
14 to Magistrate Judge Ferenbach's order and moved this Court to reconsider. (ECF No. 129).

15 16 **III. LEGAL STANDARD**

17 Magistrate judges have the authority to resolve pretrial matters subject to district court
18 review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A). "A
19 finding is clearly erroneous if it is (1) illogical, (2) implausible, or (3) without support in inferences
20 that may be drawn from the facts in the record." Ibrahim v. U.S. Department of Department of
21 Homeland Security, 835 F.3d 1048, 1058 (9th Cir. 2016) (internal quotation marks and citation
22 omitted). Under the contrary to law standard "[t]he reviewing court may not simply substitute its
23 judgment for that of the deciding court." Grimes v. City and County of San Francisco, 951 F.2d
24 236, 241 (9th Cir. 1991). Rather, the district court "must ascertain whether the order was contrary
25 to law." Riviera v. NIBCO, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004).

26 27 **IV. DISCUSSION**

28 Under the contrary to law standard, this Court may not substitute its own judgment in

1 reviewing Magistrate Judge Ferenbach's orders requiring Defendant to pay the costs of a
2 reconvened deposition with Dr. Jenkins. In its objection to Magistrate Judge Ferenbach's orders,
3 Defendant argues that sovereign immunity precludes any costs from being shifted to it, there was
4 no waiver of sovereign immunity, and the Federal Rules of Civil Procedure do not permit this cost
5 shifting. Plaintiff argues that she was entitled to cross-examination of the deponent under FRCP
6 30.

7 The Ninth Circuit has held that sovereign immunity does not exempt the United States
8 from complying with the Federal Rules of Civil Procedure and that "when the United States comes
9 into court as a party in a civil suit, it is subject to the Federal Rules of Civil Procedure as any other
10 litigant." Mattingly v. U.S., 939 F.2d 816, 818 (9th Cir. 1991). FRCP 26(b)(4)(E)(i) provides that
11 "[u]nless manifest injustice would result, the court must require that the party seeking discovery .
12 . . pay the expert a reasonable fee for time spent in responding to discovery[.]" Also, FRCP Rule
13 30(c)(1) requires that "[t]he examination and cross-examination of a deponent proceed as they
14 would at trial under the Federal Rules of Evidence[.]" Furthermore, district courts have "wide
15 discretion in controlling discovery." Blackburn v. U.S., 100 F.3d 1426, 1436 (9th Cir. 1996)
16 (citation omitted); see also Tabron v. Grace, 6 F.3d 147, 159 (3d Cir. 1993) (finding that a district
17 court's "inherent equitable powers" in supervising discovery allowed it to require that an opposing
18 party pay for copies of deposition transcripts for an indigent litigant as a condition precedent for
19 that party conducting a deposition).

20 The Court does not find that Magistrate Judge Ferenbach's orders were contrary to law,
21 and sees no reason to disturb the orders. First, the Court does not find that requiring Defendant to
22 bear the reconvened deposition costs was fee-shifting as Defendant characterizes it. Instead, this
23 was a cost that Defendant itself created, and should have initially incurred, by seeking the
24 deposition of Dr. Jenkins. Additionally, the Court finds that sovereign immunity does not preclude
25 Magistrate Judge Ferenbach's orders to reconvene the deposition and require Defendant to bear
26 the costs. Under Mattingly, sovereign immunity does not exempt the United States from adhering
27 to the Federal Rules of Civil Procedure, and Magistrate Judge Ferenbach noted the Rules as support
28 when he ordered Defendant to bear the cost of the reconvened deposition. Because Defendant was

1 the party “seeking discovery” of Dr. Jenkins, FRCP 26(b)(4)(E) supports Magistrate Judge
2 Ferenbach’s finding that Defendant should be the party who incurs the cost of deposing Dr.
3 Jenkins. Moreover, FRCP 30(c)(1) requires the cross-examination of a deponent as would take
4 place at trial. This is exactly what Plaintiff sought to do, and what Magistrate Judge Ferenbach
5 found was required in stating “it’s only fair that Ms. McGee have an opportunity to question [Dr.
6 Jenkins].” See ECF No. 126 at p. 8.

7 Furthermore, Magistrate Judge Ferenbach appropriately made an equitable determination
8 under the court’s authority to supervise discovery in requiring that Defendant bear the reconvened
9 deposition costs. Magistrate Judge Ferenbach noted potential due process implications if Plaintiff
10 were denied the opportunity to question Dr. Jenkins, based on this Court ordering limited discovery
11 on the issue of equitable tolling. See id. at p. 7–8. To this point, Magistrate Judge Ferenbach stated
12 that Plaintiff should have the opportunity to question Dr. Jenkins to ensure that there was a fair
13 hearing on the equitable tolling issue, and to protect Plaintiff’s basic due process rights. See id. at
14 p. 5. This is especially so given that Dr. Jenkins would not be testifying when the issue of equitable
15 tolling was going to be before this Court, see id., and given that Plaintiff in this case is proceeding
16 in forma pauperis, and could not afford the costs. Thus, under the Federal Rules of Civil Procedure
17 and the court’s wide discretion to supervise discovery, Magistrate Judge Ferenbach properly found
18 that Defendant should bear the costs for Dr. Jenkins’ reconvened deposition.

19 Accordingly, the Court finds that Magistrate Judge Ferenbach’s orders (ECF Nos. 113,
20 120) were not clearly erroneous or contrary to law. Therefore, the Court will not set aside the
21 deposition order nor the order that Defendant be reimbursed.

22
23 **V. CONCLUSION**

24 Accordingly, Defendant’s Motion for Reconsideration (ECF No. 129) is DENIED.

25 DATED this 31st day of October, 2017.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE